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IN THE

Supreme Court of the United States

October Term, 1967

No. ~~1225~~ 145

EDWARD T. ROEHNER,

Petitioner,

—*v.*—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

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"CONCLUSION

"The motion for leave to appeal should be granted because the subservience of the Supreme Court, New York County, and the compliancy of the Appellate Division, First Department, to the Association make the order transferring the place of trial to New York County a final order equivalent to the entry of judgment against plaintiff" 13

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IN THE

Supreme Court of the United States

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No: .....

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—*v.*—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Edward T. Roehner prays that a writ of certiorari issue to review the order of the New York Supreme Court, Appellate Division, Second Judicial Department, which agreed with petitioner that the Supreme Court of New York County, First Judicial Department, is "subservient," and the Appellate Division, First Judicial Department, compliant, to the defendant The Association of the Bar of the City of New York (Association) but held that petitioner must nevertheless try his action against the Association in the

Supreme Court of New York County. Certified copies of the briefs of both sides to the Appellate Division, Second Judicial Department (petitioner's main brief and reply brief and respondent's brief), and to the New York Court of Appeals (petitioner's brief and respondent's brief) have necessarily been filed to show that petitioner cannot get a constitutional, or fair, trial in the Supreme Court of New York County against the Association.

Opinions Below

The New York Appellate Division, Second Judicial Department, did not file an opinion. The Supreme Court of Kings County filed a memorandum opinion, which was published in the New York Law Journal of February 19, 1965 (Appendix D, *infra*, p. 28). It is not reported.

Jurisdiction

The final order of the New York Supreme Court, Appellate Division, Second Judicial Department, was dated June 21, 1965, and was entered on June 21, 1965 (Appendix C, *infra*, p. 25). Leave to appeal to the New York Court of Appeals was denied on July 27, 1965 (Appendix B, *infra*, p. 23).

Thereafter petitioner timely applied to the New York Court of Appeals for leave to appeal. Leave was denied on February 17, 1966, "upon the ground that the order appealed from does not finally determine the action within the meaning of the Constitution" (Appendix A, *infra*, p. 21).

The jurisdiction of this Court is invoked under 28 U. S. C. §1257(3).

Question Presented

May the New York Appellate Division, Second Judicial Department, agree with petitioner that the Supreme Court of New York County, First Judicial Department, is "subservient," and the Appellate Division, First Judicial Department, compliant, to the defendant The Association of the Bar of the City of New York, but deprive petitioner of his constitutional right to a fair trial by affirming an order of the Supreme Court of Kings County, Second Judicial Department, granting the Association's motion to transfer the venue from Kings County, Second Judicial Department, where the action was commenced, to the adjoining county, New York County, First Judicial Department, as the proper county?

Constitutional Provision Involved

United States Constitution, Fourteenth Amendment, §1:

"* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

Petitioner began this action in the Supreme Court of Kings County, Second Judicial Department, New York, in January 1965, against The Association of the Bar of the City of New York (Association) and its executive committee, which had unlawfully expelled him, without a hearing and in violation of the by-laws, because he had

sued to restrain it from continuing to collect an increase in dues it had obtained through the use of a false financial statement (R. 35-36).

Respondents filed a demand to change the place of trial to New York County, First Judicial Department, on the ground that none of the parties resided within Kings County when the action was commenced, that the principal place of business of the Association was within New York County, and that most of the individual defendants resided within New York County when the action was commenced (R. 9).

Petitioner opposed the change in venue on the sole ground that he could not get a constitutional, or fair, trial in the Supreme Court of New York County because of the "subservience" of the Supreme Court of New York County to the Association. His affidavit stated (R. 15-16):

> "3. Kings County was designated in the summons because the plaintiff herein did not receive a fair trial in the Supreme Court, New York County, in an action against The Association of the Bar of the City of New York, Index No. 16594 Year 1962, in which he sought to restrain the defendant from continuing to collect an increase in dues on the ground that the increase had been obtained through the use of a false financial statement. Mr. Justice Capozzoli granted the defendant's motion for summary judgment, but the defendant's subsequent conduct showed that the defendant knew it had obtained the increase through the use of a false financial statement. Apparently it was unconcerned at exposing Mr. Justice Capozzoli once he had served its purpose.

"In an affidavit filed with the Appellate Division, First Department, on his appeal in the same case from an order by Mr. Justice Marks, at Special Term, denying plaintiff's motion for a review and retaxation of costs plaintiff said:

'It would be charitable to call the opinion by Special Term (Capozzoli, J.) on the order granting summary judgment an aberration, nor was the order rationally supportable.'

"Of the short-form order by Mr. Justice Marks denying plaintiff's motion for retaxation of costs plaintiff said in the same affidavit:

'The order is not rationally supportable, and the memorandum opinion of Mr. Justice Marks is very odd, since he must know better.'

"The Appellate Division, First Department, which reversed the order of Mr. Justice Marks, with costs to plaintiff, did not disagree with plaintiff's characterization of the orders and opinions of Justices Capozzoli and Marks.

"4. In view of the subservience, of the Supreme Court, New York County, to The Association of the Bar of the City of New York set forth in '3' hereof, it would be a mockery of justice to transfer this cause to New York County."

The respondents then moved to change the place of trial to New York County. In his supporting affidavit James H. Halpin, Esq., counsel for the respondents, stated (R. 8):

"* * * In reversing Mr. Justice Marks' order the Appellate Division made no comments on plaintiff's remarks

with respect to Justices Capozzoli and Marks. Their silence does not show approval of plaintiff's gratuitous insults to these Justices nor subservience of the Supreme Court, New York County to the defendants nor indicate in any way that plaintiff cannot obtain a fair trial there."

Petitioner answered this by saying (R. 11-12):

"• • • Plaintiff did not say that the failure to comment showed approval. But the failure to disagree was damning. It completely supports plaintiff's statement that he cannot get a fair trial in the Supreme Court, New York County • • •"

Mr. Justice DiGiovanna granted the motion to change the place of trial to New York County. He held that whether the Supreme Court of New York County was subservient to the Association had to be decided by the Supreme Court of New York County (Appendix D, *infra*, p. 28).

Petitioner quoted on p. 14 of his main brief to the Appellate Division, Second Judicial Department, from his reply brief to the Appellate Division, First Judicial Department, on the appeal from the order of summary judgment granted by Mr. Justice Capozzoli. His quotation showed that the Association in its brief to the Appellate Division, First Judicial Department, had said that petitioner had made unfounded charges of fraud, perjury, and unprofessional conduct against fellow members, officers and former officers of the Association, that those charges should be "left to be answered and tried at the proper time and in the proper forum." The quotation included petitioner's reply to that statement:

"• • • Defendant [the Association] does not state what the proper time and the proper forum would be. Plaintiff urges that the time is now, and the forum this Court. The record makes clear that the conduct of defendant's officers, present and past, calls for disciplinary action by this Court. • • •

"It is important for the reputation of both bench and bar that this Court act swiftly to exercise its disciplinary power over the bar. Otherwise those men who control the defendant will go unpunished—Borkin [*The Corrupt Judge* (1962)] shows that they are not punished even when they corrupt judges."

Petitioner continued on p. 15 of his main brief to the Appellate Division, Second Judicial Department, that the brief to the Appellate Division, First Judicial Department, from which he had quoted was dated April 1963; that on May 16, 1963, the Appellate Division, First Judicial Department, affirmed the order granting summary judgment; and that

"At a special meeting of the Association on October 29, 1963, Presiding Justice Botein was awarded the Medal of the Association for 'exceptional contributions to the honor and standing of the Bar in this community.' Mr. Brownell, the president, whom, as already stated, plaintiff in his supplemental affidavit on the motion to strike the answer as sham had charged with perjury because of his verification of the amended answer on knowledge, presided. • • •"

Herbert Brownell stated that the Association cherished the Medal, that it had been awarded only four times and only to former presidents of the Association (Ptr's Main Brief 15).

The last paragraph to begin on p. 15 of petitioner's main brief to the Appellate Division, Second Judicial Department, was:

> "There has been no investigation of what the Association in its brief more than two years ago called unfounded charges by plaintiff of fraud, perjury, and unprofessional conduct against fellow members, officers and former officers of the Association, which the Association said would be answered and tried at the proper time and in the proper forum. Nor has any proceeding ever been instituted against plaintiff. But Presiding Justice Botein has received the Medal of the Association, for 'exceptional contributions to the honor and standing of the bar in this community,' awarded only four times previously and only to former presidents of the Association."

The respondents' brief did not deny any of petitioner's charges of judicial misconduct. Petitioner said in the opening paragraph of his reply brief to the Appellate Division, Second Judicial Department:

> "Defendants' brief does not deny any of the acts of judicial misconduct recited by plaintiff in his main brief. This admission is proof beyond a reasonable doubt that plaintiff cannot get an impartial trial in the Supreme Court, New York County, against The Association of the Bar of the City of New York."

The Appellate Division, Second Judicial Department, affirmed without opinion, but denied the respondents both costs and taxable disbursements (Appendix C, *infra*, p. 25). It denied petitioner's motion for leave to appeal

to the New York Court of Appeals (Appendix B, *infra*, p. 23).

In support of his application to the New York Court of Appeals for leave to appeal, petitioner stated the following Question Presented, four points, and conclusion:

"Question Presented

"Where an order transferring the venue from Kings County to New York County is a final order because the record shows conclusively—and the Appellate Division, Second Department, agrees—that because of the subservience of the Supreme Court, New York County, and the compliancy of the Appellate Division, First Department, to the defendant The Association of the Bar of the City of New York plaintiff cannot get an impartial, or constitutional, trial in New York County against the Association, does due process require a trial outside the First Judicial Department?"

"POINT I

"The Appellate Division, First Department, tacitly admits that Special Term, New York County (Capozzoli, *J.*, and Marks, *J.*), denied plaintiff due process.

"In his affidavit to the Appellate Division, First Department (17-26) asking it to recuse itself from hearing his appeal from the order of Marks, *J.*, denying him a review and retaxation of costs plaintiff said that the order of Capozzoli, *J.*, granting the Association summary judgment, affirmed without opinion by the Appellate Division, First Department, was not rationally supportable and that it would be charitable to call his opinion an aberration (25); and that the order of

Marks, *J.*, was also not rationally supportable and that his memorandum opinion was very odd because he must know better (23).

"The Appellate Division, First Department, which denied plaintiff's motion, did so without in any way disagreeing with his characterization of the orders and opinions of Capozzoli, *J.*, and Marks, *J.* (10-11).

"The Appellate Division, First Department, would not have permitted such characterization of Justices of the Supreme Court, New York County, by an attorney unless the record showed complete justification for his language.

"POINT II

"The Appellate Division, First Department, tacitly admits that it grievously wronged plaintiff.

"Plaintiff moved the Appellate Division, First Department, to recuse itself from hearing his appeal from the order of Marks, *J.*, because it had forfeited respect by its conduct so far in his case against the Association (22).

"When the Appellate Division, First Department, let that statement go unchallenged and unanswered, it tacitly admitted the truth of plaintiff's charges.

"POINT III

"The Appellate Division, Second Department, agrees that plaintiff cannot get an impartial trial in New York County against the Association.

"That the Appellate Division, Second Department, does not believe that plaintiff can get an impartial trial

in New York County against the Association is the only construction that can be placed on its denial of costs and taxable disbursements in its affirmance without opinion of the transfer to New York County as the proper county.

"Plaintiff had cross-moved to retain the action in Kings County on the sole ground that he cannot get an impartial trial in New York County because of the subservience of the Supreme Court, New York County, and the compliancy of the Appellate Division, First Department, to the Association. The denial of costs and taxable disbursements therefore meant that the Appellate Division, Second Department, was convinced beyond a reasonable doubt that plaintiff was correct. The affirmance of the order transferring the venue to New York County could only mean that the court could not expressly hold the Supreme Court, New York County, was subservient, and the Appellate Division, First Department, compliant, to the Association. It did that by its denial of costs and taxable disbursements.

"POINT IV

"The failure of the Association to act on plaintiff's charges in his brief to the Appellate Division, Second Department, of judicial misconduct by the Supreme Court, New York County, and the Appellate Division, First Department, proves the truth of plaintiff's charges.

"The Association, the disciplinary arm of the Appellate Division, First Department, would be expected to be swift to see that charges by an attorney of judi-

cial misconduct by Justices of the Supreme Court, New York County, and of the Appellate Division, First Department, were put to the proof. Especially would this be expected when the Justices were charged with having so acted in aid of the Association.

"The order of the Appellate Division, Second Department, denying leave to appeal to the Court of Appeals was entered July 27, 1965, more than six months ago. Since no copy of the order was served on plaintiff he has waited to permit the institution of a disciplinary proceeding against him, which would have been begun immediately as of course unless plaintiff's charges were true and could be proved to be true.

"That no proceeding against plaintiff has been instituted in the more than six months that have elapsed since the entry of the order denying leave to appeal to the Court of Appeals is of itself convincing proof that the charges by plaintiff of judicial misconduct are correct, and that to compel him to try his case in the Supreme Court, New York County, is the equivalent of a judgment against him in favor of the Association.

"The failure to institute proceedings against plaintiff is especially significant, since, as set forth in the facts, the Association said in its brief to the Appellate Division, First Department, on the appeal from the order of Capozzoli, *J.*, that plaintiff had made unfounded charges of fraud, perjury, and unprofessional conduct against fellow members, officers, and former officers of the Association.

"CONCLUSION

"The motion for leave to appeal should be granted because the subservience of the Supreme Court, New York County, and the compliancy of the Appellate Division, First Department, to the Association make the order transferring the place of trial to New York County a final order equivalent to the entry of judgment against plaintiff."

The respondents' brief was one paragraph:

"The order of the Appellate Division, Second Department, entered June 21, 1965, which unanimously affirmed the order of Supreme Court, Kings County granting defendants' motion to change the venue of this action from Kings County to New York County did not finally determine this action, therefore, this Court is without jurisdiction to grant plaintiff's motion for leave to appeal. CPLR 5602(a); *Beckwith* v. *Beckwith*, 285 N. Y. 521."

The Court of Appeals denied the application for leave to appeal without allowance to the respondents of costs or taxable disbursements (Appendix A, *infra*, p. 21).

Reasons for Granting the Writ

The Appellate Division, Second Judicial Department, and the New York Court of Appeals have made clear that they do not believe that petitioner can get a constitutional, or fair, trial in the Supreme Court of New York County against the Association. The denial by both courts of costs and taxable disbursements is susceptible of no other inter-

pretation, for the sole ground advanced by petitioner for keeping Kings County, Second Judicial Department, as the place of trial was that the Supreme Court of New York County is "subservient," and the Appellate Division, First Judicial Department, compliant, to the Association. The transfer to New York County is therefore a final order equivalent to the entry of judgment against petitioner.

Another reason for granting the writ is this Court's supervisory power over the federal courts. The relationship between the Association and the United States Court of Appeals for the Second Circuit requires examination. In *Dulles (Est. of William Nelson Cromwell)* v. *Johnson*, 273 F. 2d 362 (Dec. 1959), the Second Circuit reversed the District Court for the Southern District of New York, 155 F. Supp. 275 (1957), to hold that bequests to the Association are deductible for estate tax purposes. Until then bequests to the Association had been held to be nondeductible. *Alfred A. Cook*, 30 B. T. A. 292 (1934).

Of the work of the Association's committees in influencing legislation, the Second Circuit said in *Dulles*:

> "Through their various committees the Associations study and report on proposed and existing legislation. Often they send copies of their reports and resolutions to the legislative, executive and judicial branches of the federal and state governments. The major portion of this work is of a technical nature involving the adequacy of proposed and existing legislation in terms of its form, clarity of expression and its effect on and relation to the law. The associations' work has been expressed in expert reports on matters uniquely within the fields of experts and has avoided questions which

are outside those fields, *i.e.*, questions which turn largely on economic or political decisions.

"These activities serve no selfish purpose of the legal profession—rather they constitute an expert's effort to improve the law in technical and noncontroversial areas. In our opinion these activities are scientific, educational and charitable."

The news report from the state capitol in *The New York Times*, June 11, 1965, p. 33, of the legislative activities of the Association shows that the limited legislative activities of the Association as recited in *Dulles* were not founded on fact. The news report was:

"Observers here credit several factors as responsible for ending the Legislature's reluctance to act on the divorce problem.

"The most significant factor, it is believed, was the vigorous campaign carried on by the city bar association, which let it be known that legislators who tried to block the reform plan again would meet with opposition at election time.

* * * * *

"A spokesman for the lawyers' group said today that 'it was made clear to everybody that the bar association is not going to sit back and let the subject be neglected any more.'

"The spokesman, Howard Hilton Spellman, chairman of the Association's Special Committee on Matrimonial Law, also promised further protest if the study committee proved to be 'just a gesture.'

" 'If there is not positive action,' Mr. Spellman said, 'we will carry the fight to the people so that they can express themselves at the polls.' "

The threat by the Association to the New York legislature shows that the Association's brief to the Second Circuit and the memorandum opposing certiorari in *Dulles*, which are discussed below, were a fraud upon this Court.

Had the Association not lied to the Second Circuit in its brief, as its own Committee reports set forth below show, the Second Circuit could not have held bequests to the Association deductible for estate tax purposes. The American Bar Association does not accept *Dulles*, for it said in Robert Ash, Separate Fund Is Organized to Sponsor Association's Educational Activities, 50 *A. B. A. J.* 48 (1964), first column, end of second paragraph:

"* * * Even though gifts to a bar association are for worthwhile purposes, they are not deductible. (See *Alfred A. Cook*, 30 B. T. A. 292.)"

The brief *amici curiae* of the bar associations, on which Whitney North Seymour (a former president of the Association), Weston Vernon, Jr., and D. Nelson Adams, appeared as attorneys, said at pp. 13-14:

"* * * a majority of the legislative services performed by the Bar Associations involves nothing more than the drafting of, or passing upon the technicalities of, proposed legislation.* In exceptional cases an opinion,

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"* For example, the Bulletin of the Committee on State Legislation of the Association of the Bar bears the following legend: 'This Committee does not initiate legislation. It confines its attention to the form and adequacy of legislative proposals in relation to which lawyers may fairly be expected to have a particular competence and it refrains from expressions of opinion upon the social, economic, political or administrative policy of such bills.'"

based upon experience in a given field, is rendered with respect to the policy of a proposed bill from a legal standpoint, but the Bar Associations do not press any 'legislative program' in furtherance of which any attempt to influence legislation is made.

And the brief in opposition to the petition for certiorari in *Dulles,* by Norris Darrell, a former vice president of the Association, senior tax partner of Sullivan & Cromwell, attorneys for the Cromwell Estate, said:

"* * * the bar associations' work in relation to legislation has been small in relation to total activities and has been 'expressed in expert reports on matters uniquely within the fields of experts and has avoided questions which are outside those fields, i.e., questions which turn largely on economic or political decisions.'"

Despite the brief to the Second Circuit and the brief to this Court in opposition to the Government's petition for certiorari, the Association functioned then as it does now in influencing legislation, for while the appeal was pending the Association boasted in its Committee Reports for 1958-1959, published as a supplement to the October 1959 issue of the Association's periodical, *The Record,* at p. 58, that it had secured a change in the public policy of the state unaltered for more than 125 years regarding the accumulation of income, which had been limited to the minority of the beneficiary. In the 1960 Committee Reports, at pp. 75-76, the Association said:

"This year saw the completion of the program successfully initiated under the sponsorship of this Committee three years ago and continued last year and this

year, as the result of which reforms in the laws relating to perpetuities and accumulations, which had been unsuccessfully sought for over a century, have at last been accomplished."

On February 13, 1962, the New York City newspapers published that Orison S. Marden, president of the Association, and David W. Peck, of Sullivan & Cromwell, president of the New York State Bar Association, formerly Presiding Justice of the Appellate Division, First Judicial Department, had jointly announced that the two bar associations would sponsor legislation to provide a New York State supplement of $10,000 a year to the salary of every Circuit Judge of the Second Circuit. Mr. Marden said that he believed the legislation to be constitutional.

The legislation would have been clearly unconstitutional. So that judges may be independent, the Constitution provides that their salaries may not be diminished by Congress —yet the bar associations proposed to supplement the salaries of federal judges by a retainer terminable at will. The possibility was obvious of conflict between the Second Circuit's duty and its financial interest. And as Dean Griswold has said (74 *Harv. L. Rev.* 81 (1960) at 91): "Long human experience has shown that where there is interest there is not likely to be independence of judgment."

While the Second Circuit was in this position of dependence upon the Association for a $10,000 increase in salary, on May 31, 1962, petitioner filed a verified petition with the Second Circuit (Case No. 27595) charging Whitney North Seymour, Weston Vernon, Jr., and D. Nelson Adams, who had appeared for the Association in *Dulles,* with grave professional misconduct in having grossly lied to the court

in their brief. They filed an answering affidavit and moved to dismiss the petition as scandalous and to expunge it from the records of the court. Petitioner filed a replying affidavit in which he charged them with brazen perjury in their answering affidavit. On June 19, 1962, without oral argument, the court dismissed the petition, all the active judges concurring, but denied the motion to dismiss it as scandalous or to expunge it from the records of the court.

That the motion to dismiss the petition as scandalous and to expunge it from the records of the court would have been granted if petitioner's charges of gross professional misconduct were not true is not open to question. And if the three respondents did not commit perjury in June 1962, as petitioner charged in his replying affidavit, then petitioner committed perjury in his replying affidavit. At the least, petitioner was guilty of professional misconduct if he made untrue charges of perjury in a disciplinary proceeding he had instituted. No proceeding, however, has ever been instituted against petitioner.

The conflict of interest of the judges in the disciplinary proceeding is an excellent illustration of the unsoundness of the statement of Mr. Marden, president of the Association, that the payment of $10,000 a year by New York State to judges of the Second Circuit would be constitutional. If the United States Court of Appeals for the Second Circuit had found the three respondents guilty as charged, all hope of the $10,000 a year salary supplement from New York State would have vanished.

On October 7, 1962, the Judicial Conference of the United States (Chief Judge Lumbard of the Second Circuit dissenting) voted that the proposal that New York State

make supplemental salary payments to the federal judges presented an undesirable policy and raised serious constitutional questions. The Judicial Conference authorized the Director of the Administrative Office of the United States Courts to make known the Conference action to the appropriate authorities in New York State in advance of the publication of the report of Mr. Chief Justice Warren. The action of the Conference was immediately communicated to Governor Rockefeller and other New York State officials.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD T. ROEHNER
Attorney for Petitioner

May, 1966

APPENDIX A

Order Appealed From

COURT OF APPEALS
STATE OF NEW YORK

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Seventeenth day of February A. D. 1966.

Present:

HON. CHARLES S. DESMOND,
Chief Judge, presiding.

2 Mo. No. 217

EDWARD T. ROEHNER,
Appellant,

—VS.—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *et al.*,
Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

Appendix A
Order Appealed From

ORDERED, that the said motion be and the same hereby is dismissed upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution.

(Seal of State of New York
Court of Appeals)

A copy

GEABON KIMBALL
Deputy Clerk

APPENDIX B

Order Denying Leave to Appeal

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 27th day of July, 1965.

Present:

HON. GEORGE J. BELDOCK,
Presiding Justice.
" HENRY L. UGHETTA,
" ARTHUR D. BRENNAN,
" L. BARRON HILL,
" SAMUEL RABIN,
Justices.

EDWARD T. ROEHNER,
Appellant,

—v.—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *et al.*,
Respondents.

ORDER ON MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

The above named EDWARD T. ROEHNER, appellant in this action, having made a motion for leave to appeal to the

Appendix B

Order Denying Leave to Appeal

Court of Appeals; and the motion having been duly submitted;

Now on reading and filing the papers in support of and in opposition to said motion; and all the papers upon which the appeal was heard; and due deliberation having been had thereon:

IT IS ORDERED that the said motion be and the same hereby is denied.

ENTER:

JOHN J. CALLAHAN
Clerk,

APPENDIX C

Order of Affirmance

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 21st day of June, 1965.

Present:

HON. MARCUS G. CHRIST,
Acting Presiding Justice.
" ARTHUR D. BRENNAN,
" L. BARRON HILL,
" JAMES D. HOPKINS,
" A. DAVID BENJAMIN,
Justices.

EDWARD T. ROEHNER,
Appellant,

—v.—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *et al.*,
Respondents.

ORDER ON APPEAL FROM ORDER

The above named EDWARD T. ROEHNER, plaintiff in this action having appealed to the Appellate Division of the Supreme Court from an order of the Supreme Court entered

Appendix C
Order of Affirmance

in the office of the Clerk of the County of Kings on February 26, 1965, which granted the defendants' motion, made pursuant to statute (CPLR 510, subd. 1), to change the place of trial from Kings County to New York County, herein, and the said appeal having been argued by Mr. Edward T. Roehner the appellant in person and submitted by Mr. James H. Halpin of Counsel for the respondents, and due deliberation having been had thereon; and upon the opinion and decision slip of the court herein, heretofore filed; and made a part hereof:

IT IS ORDERED that the order so appealed from be and the same hereby is unanimously affirmed, without costs.

ENTER:

JOHN J. CALLAHAN
Clerk

Decision Slip

By CHRIST, *Acting P.J.*;
BRENNAN, HILL, HOPKINS and BENJAMIN, *JJ.*

Roehner, ap, v. *Ass'n of the Bar of the City of N. Y.,* res—In an action against a Bar association and certain members of its executive committee in office in 1963, to restore the plaintiff to membership in said association and to recover damages for mental suffering allegedly caused by its censure and expulsion of the plaintiff as a member thereof, the plaintiff appeals from an order of the Supreme Court, Kings County, entered February 26, 1965, which granted the defendants' motion, made pursuant to statute (CPLR 510, subdiv. 1), to change the place of trial from Kings County to New York County. Order affirmed, without costs. No opinion.

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* "1963" is a judicial slip; petitioner was expelled in May 1964 (R. 36).

APPENDIX D

Memorandum Opinion of Mr. Justice DiGiovanna

New York Law Journal, Friday, February 19, 1965

Supreme Court, Special I, Kings County

DiGiovanna, *J.*

Roehner v. *Ass'n of the Bar of the City of N. Y.*—Motion for change of venue is granted. This action belongs in New York County and until the courts in New York County permit the removal of the action therefrom on the ground that they are prejudiced or otherwise incapable of handling this action, the motion for change of venue must be granted. Settle order on notice.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 15 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~1325~~ 145

EDWARD T. ROEHNER,

Petitioner,

vs.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *et al.*,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

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JAMES H. HALPIN,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1325

EDWARD T. ROEHNER,

Petitioner,

vs.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *et al.*,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

Question Presented

Is the order of the New York Supreme Court, Appellate Division, Second Department, affirming the order of the Supreme Court, Kings County, granting respondents' motion to change the venue of this action from Kings County to New York County a final judgment or decree reviewable by this Court under Title 28 USC § 1257?

Statement of the Case

Petitioner seeks review of the order of the New York Supreme Court, Appellate Division, Second Department, which affirmed the order of the Supreme Court, Kings

County, granting respondents' motion to change the venue of this action from Kings County to New York County.

Petitioner brought this action in January 1965 for damages claimed to have been suffered by reason of his wrongful expulsion from respondent, The Association of the Bar of the City of New York ("Association") and for reinstatement as a member of the Association. Respondents moved in the Supreme Court, Kings County, for an order changing the venue of the action from Kings County to New York County on the ground that Kings County was an improper county under New York Civil Practice Law and Rules ("CPLR") 503(a) since none of the parties resided in Kings County at the time this action was brought. Respondents' motion was granted and an order entered directing a change of venue (App. 28).* On appeal to the Appellate Division, Second Department, the order was affirmed (App. 25-27). Thereafter leave to appeal to the Court of Appeals was denied by the Appellate Division and by the Court of Appeals (App. 21-24). The latter court denied petitioner's motion on the ground that "the order sought to be appealed from does not finally determine the action within the meaning of the Constitution" of the State of New York (App. 21-22).

Argument

Under Title 28 USC § 1257, this Court may review only "[f]inal judgments or decrees" of state courts, that is, judgments or decrees which effectively determine the liti-

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* "App." refers to the Appendices to the Petitioner's Petition for a Writ of Certiorari; the numbers refer to the relevant pages in the Appendices to the Petition.

gation. See, e.g., *Montgomery Building & Construction Trades Council* v. *Ledbetter Erection Co., Inc.*, 344 U. S. 178 (1952); *Market Street Ry. Co.* v. *Railroad Comm'n*, 324 U. S. 548, 551 (1944).

The order of the Appellate Division, Second Department, which petitioner seeks to have reviewed does not determine this litigation for it only directs the transfer of this action from Kings County to New York County. As indicated by the New York Court of Appeals, it is not a final order, and no argument can make it so. Moreover, this Court has specifically held that the judgment of a state court granting a motion for change of venue is not a final judgment. *Cincinnati Street Ry. Co.* v. *Snell*, 179 U. S. 395 (1900).

Not only has there been no adjudication on the merits, but petitioner, if he is so advised, may still move in New York County under CPLR 510 for an order directing transfer of this action to another county on the ground that there is reason to believe that an impartial trial cannot be had in New York County. Indeed, the decision of the Supreme Court, Kings County (App. 28), indicates that the issue petitioner seeks to present, namely, that he would not receive an impartial trial in New York County was not considered by that court because, under New York law, the proper court to determine that issue was the Supreme Court, New York County. Thus, any consideration by this Court of petitioner's argument would be premature in view of the fact that the issue of a fair trial has not yet been decided by the New York courts and can now be raised by petitioner in the Supreme Court, New York County.

Respondents also submit that petitioner has made no showing that this is a case involving "special and important reasons" for granting a writ of certiorari, as required by Supreme Court Rule 19. See *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U. S. 70, 74 (1955).

Conclusion

The order sought to be reviewed is not final; accordingly the petition for a writ of certiorari should be denied.

June 9, 1966.

Respectfully submitted,

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JAMES H. HALPIN,
Of Counsel.

APPENDIX

Title 28, United States Code

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

New York Civil Practice Law and Rules

§ 503. Venue based on residence

(a) **Generally.** Except where otherwise prescribed by law, the place of trial shall be in the county in which one of the parties resided when it was commenced; or, if none of the parties then resided in the state, in any county designated by the plaintiff. A party resident in more than one county shall be deemed a resident of each such county.

§ 510. Grounds for change of place of trial

The court, upon motion, may change the place of trial of an action where:

1. the county designated for that purpose is not a proper county; or

2. there is reason to believe that an impartial trial cannot be had in the proper county; or

3. the convenience of material witnesses and the ends of justice will be promoted by the change.

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IN THE

Supreme Court of the United States

October Term, 1965

No. ~~1325~~ 145

EDWARD T. ROEHNER,

Petitioner,

—*v.*—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *et al.*,

Respondents.

PETITIONER'S REPLY BRIEF

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In the

Supreme Court of the United States

October Term, 1965

No. 1325

Edward T. Roehner,

Petitioner,

—*v.*—

The Association of the Bar of the City of New York, *et al.*,

Respondents.

PETITIONER'S REPLY BRIEF

Respondents do not dispute petitioner's illustrations of subservience by the Supreme Court, New York County, and compliancy by the Appellate Division, First Judicial Department, to the defendant The Association of the Bar of the City of New York. This is a clear admission that the order petitioner seeks to have reviewed is a final order under the tests this Court applies.

Respondents argue that whether an order is final is a question of state law, saying of the order petitioner seeks to have reviewed, "As indicated by the New York Court of Appeals, it is not a final order, and no argument can make it so." (Br. 3.) This Court holds to the contrary. *E.g.*, in *Gotthilf* v. *Sills*, 376 U. S. 79, 80 (1963), it said that whether an order is final is "a question of purely federal law."

The petition for writ of certiorari presents a grave and continuing question regarding the administration of justice in both state and federal courts, even including the perpetration of fraud upon this Court. Respondents touch none of petitioner's charges in their brief in opposition, not even his charge (Br. 16) of fraud upon the Court.

Respectfully submitted,

EDWARD T. ROEHNER
Attorney for Petitioner

June 14, 1966

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THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *et al.*,

Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 145

EDWARD T. ROEHNER,

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—*v.*—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *et al.*,

Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI

Petitioner respectfully requests the Court to reconsider its order denying his petition for writ of certiorari and on reconsideration to grant his petition on the following grounds not advanced in his petition.

Additional circumstances which show that to require petitioner to try this action in the Supreme Court, New York County, and to appeal to the Appellate Division, First Judicial Department, is to deprive him of due process of law.

On May 6, 1966, The New York Times announced that Mr. Justice Louis J. Capozzoli, of the Supreme Court, New York County, had been appointed to the Appellate Division, First Judicial Department. It was he who granted the Association's motion for summary judgment by an order "not rationally supportable" accompanied by an opin-

ion "it would be charitable to call * * * an aberration" (Record, p. 15).

The New York Law Journal of November 10, 1966, announced that James H. Halpin, Esq., of counsel on the respondents' brief in opposition to the petition for certiorari and attorney for the respondents in the state courts, had been appointed by the Association chairman of a committee to cooperate with the American Bar Association on the revision of the canons of ethics. Charles D. Breitel was listed as a member of the committee. He is Mr. Justice Breitel, who presided at the appeal by petitioner in the earlier action from the order granting the Association's motion for summary judgment. Mr. Justice Breitel accepted the appointment to the committee, despite the fact that he had judicial knowledge that Mr. Halpin, the chairman, had committed perjury in the prior action by petitioner against the Association (Record, p. 22, first full paragraph). Mr. Halpin was also appointed to the Judiciary Committee.

And, as stated in the petition, Presiding Justice Botein, after the affirmance by his court without opinion of the "not rationally supportable" order of Mr. Justice Capozzoli granting the Association's motion for summary judgment, received from Mr. Brownell, president of the Association, the Medal of the Association for "exceptional contributions to the honor and standing of the Bar in this community," even though Presiding Justice Botein had knowledge of Mr. Brownell's perjury in the prior action.

The elevation of Mr. Justice Capozzoli from the Supreme Court, New York County, to the Appellate Division, First Judicial Department, to which an appeal from the denial by the Supreme Court, New York County, of the motion

for change of place of trial will go, makes certain that no Justice in New York County will grant petitioner's motion for a change of place of trial. The fact that Mr. Justice Capozzoli is a member of the Appellate Division, First Department; plus the fact that Mr. Justice Breitel accepted a post on a committee of the Association of which Mr. Halpin is chairman, even though Mr. Justice Breitel had judicial knowledge that Mr. Halpin had committed perjury; plus the fact that Presiding Justice Botein accepted the Medal of the Association from Mr. Brownell make certain that an appeal by petitioner from an order denying his motion for a change of place of trial will be denied. The New York Court of Appeals has already held in this action that the denial of a motion for a change of place of trial—even though without a change of place of trial the outcome of the action is certain regardless of merit—does not finally determine the action within the meaning of the Constitution of the State of New York.

So far as the courts of New York State are concerned, then, because petitioner lives in New York County he is not entitled to any relief against the Association. In "The Power Elite," a paper in *Problems of Power in American Democracy* (Kornhauser ed. 1957), C. Wright Mills says at 167: "The power elite * * * with the exception of the politicians among them, [are] overwhelmingly from the East." The Association can be substituted for "the East." It is the belief of the Nation that the Court is the rock upon which any power elite will break if it seeks to violate due process. There is no reason why the rule of due process should be inapplicable to petitioner because his suit is against the Association. And petitioner is denied due process if he sues in New York County—the order of Mr. Justice Capozzoli granting the Association's motion for summary judgment in the previous action, in clear

defiance of law, and the affirmance without opinion by the Appellate Division, First Judicial Department, have proved that conclusively.

The effect of the Association upon the three national legal-judicial associations.

Herbert Brownell, Esq., Orison S. Marden, Esq., and Norris Darrell, Esq., respectively president of the American Judicature Society, the American Bar Association, and the American Law Institute, the three national legal-judicial associations, are members of the small group of conscienceless[1] men who control the respondent Association.[2]

Their conduct, detailed below, shows that they consider themselves free from the rules of honorable conduct that traditionally bind the bar. This is perhaps to be expected, for to their predecessors in control of the Association a good judge was a judge subservient to them. For example, on January 18, 1923, Mr. Hilles, Chairman of the Finance Committee of the Republican National Committee, wrote Mr. Chief Justice Taft about them when he was seeking a New York candidate to succeed Mr. Justice Pitney on the Court:

> "I confess that I have been somewhat disillusioned these last few weeks as to the pure patriotism of several tremendously successful and conspicuous mem-

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[1] The adjective "conscienceless" will be supported by the material under this heading.

[2] Edward N. Costikyan, Esq., a partner in Paul, Weiss, Rifkind, Wharton & Garrison, one of the so-called Wall Street law firms, and a member of the Association, says of the Association in *Behind Closed Doors* (1966) 205: "Today twenty or thirty law firms between them dominate the Bar Association." He also says at 184-5, of the selection by the Association of judicial candidates: "I have little confidence in the appraisals of that organization."

> bers of the Bar, because I have found that the candidates whom they were supporting aggressively are men who have heretofore been very useful to them, and who would be expected to further matters which are of tremendous concern to them and to their clients." (W. F. Murphy, "In His Own Image: Mr. Chief Justice Taft and Supreme Court Appointments," *The Supreme Court Review* 1961, 159 at 182.)

Mr. Hilles, considering his office, could not have been an innocent, and yet he was surprised at the improper attitude of the leaders of the New York bar toward the bench.

(a) The American Judicature Society

After the petition for certiorari was docketed, Herbert Brownell, Esq., became president of the American Judicature Society. Since neither in petitioner's earlier action against the Association (certiorari denied, 376 U. S. 909 (1964)), nor in this action has there been denial of petitioner's charge of perjury by Mr. Brownell in the earlier action, which was to restrain the Association from continuing to collect an increase in dues obtained through the use of a materially false financial statement, it must be accepted that the charge of perjury by Mr. Brownell is true. One of the three national legal-judicial associations is therefore headed by a man lacking the moral qualifications to be a member of the bar.

(b) The American Bar Association

After the petition was docketed Orison S. Marden, Esq., became president of the American Bar Association. Like Mr. Brownell, Mr. Marden lacks the moral qualifications to be a member of the bar. Petitioner will not discuss Mr.

Marden's attempt as president of the respondent Association to obtain a $10,000 retainer from New York State for the judges of the United States Court of Appeals for the Second Circuit after they reversed the District Court in *Dulles* v. *Johnson*, 237 F. 2d 362 (December 1959), to hold, on the basis of a false brief filed by the Association, that bequests to the Association are deductible for estate tax purposes, since that has already been discussed in the petition.

Petitioner does refer to the allegations of his verified complaint, pp. 29-37 of the Record. Paragraph 13, p. 31, says that petitioner was informed by the committee on grievances of the Association that a complaint had been made against him because of his conduct at the October 1957 meeting. Petitioner at that time had objected to the falsification of the minutes of the preceding (May 1957) meeting by Louis M. Loeb, Esq., the president, so as to remove from discussion at the October meeting the fact that a materially false financial statement had been used to obtain an increase in dues. Paragraph 14 says that the only information as to the complaint the committee would give petitioner, in answer to his written inquiry, consisted of conclusory statements, such as that plaintiff had been offensive in his remarks addressed to the president (Mr. Loeb) and had impugned the integrity of the books and records of the Association. Paragraph 15 says that petitioner refused to appear before the committee unless factual allegations were first made. Paragraph 16 says that the committee refused to make any factual allegations in writing, but offered to play back for petitioner a tape recording of the meeting. Paragraph 17 says that petitioner again offered to answer factual allegations, but refused to answer conclusory statements. Paragraph 18

says that on February 24, 1958, Albert R. Connelly, Esq., chairman of the executive committee of the Association, wrote petitioner that the executive committee had censured petitioner for his conduct at the March, May, and October 1957 meetings. Since no complaint had been made as to the March and May meetings the censure as to those meetings was a violation of the by-laws; petitioner had not even been told that there was any objection to his conduct at the March and May meetings.

Thus because petitioner refused to appear before a hostile committee of the Association—a committee appointed by the president, Louis M. Loeb, whom the petitioner on the floor, at the October 1957 meeting, had rightly accused of grossly dishonorable conduct—unless factual allegations were made, something any competent lawyer would insist upon, he was censured in his absence not only for his conduct at the October 1957 meeting but also, without any warning to him, for his conduct at the March and May 1957 meetings, against which no complaint had been made.

The executive committee, by their censure of petitioner, knowing that their conduct was in violation of the by-laws and of due process and was bound to be harmful to petitioner, both financially and professionally, showed themselves morally unfit. Mr. Marden was a member of that committee.

Paragraph 19, p. 32, says that on March 10, 1958, petitioner wrote Mr. Connelly that the entire proceeding against him had been disorderly and with a complete disregard for rules of procedure and the by-laws of the Association, and that in its letter of censure the executive committee had even censured him for his conduct at the

March 1957 and May 1957 meetings, although no complaint had ever been filed against him as to those meetings, and under the by-laws the executive committee could not censure him as to those meetings. Petitioner demanded that the entire censure, which was unlawful, be expunged.

Paragraph 20 says that the executive committee refused to expunge the censure.

Paragraph 21 says that on October 14, 1959, petitioner wrote Orison S. Marden, Esq., then chairman of the executive committee, demanding that the censure be expunged. Paragraph 22 says that the request was denied. Mr. Marden, who had been a member of the executive committee before the false financial statement was used and until after he wrote the refusal to expunge the censure was aware that there was no basis for any part of the censure, and that there could be none for the two meetings as to which no complaint had been made against petitioner. His conduct was dishonorable and showed him lacking in the moral qualifications required of a lawyer. (Mr. Halpin in his affidavit, p. 7 of the Record, first full paragraph, says that this Court, at 376 U. S. 909, denied certiorari in petitioner's previous action against the Association. Page 24 of the record in that case shows that Mr. Marden signed the materially false financial statement and was a member of the executive committee at that time.)

A man who, like Mr. Marden, will violate a position of trust so that he and the rest of the small group that control the Association can have larger sums at their disposal is morally unfit to be a member of the bar, let alone president of the American Bar Association. Even graver is the fact that he knowingly injured petitioner financially and professionally by the unlawful censure, and later by re-

fusing to remove the censure, even though he knew that petitioner's conduct had at all times been proper and that petitioner's charges were justified.

(c) The American Law Institute

Norris Darrell, Esq., a former vice president of the Association, is president of the American Law Institute. The petition showed, and the respondents' brief did not deny, that he perpetrated a fraud upon this Court and defrauded the Treasury of a substantial sum of money.

Since the three national legal-judicial associations are controlled by the small group of conscienceless men that control the Association, it is correct to say that justice itself is being infected by a legal group more dangerous to the public weal than is the Mafia.

CONCLUSION

Petitioner is an officer of the Court. It is his duty to protect the Court when it is unjustly attacked. But it is a poor rule that does not cut both ways. Petitioner has suffered great financial and professional loss because of the unlawful censure by the executive committee of the Association; and he has suffered greater financial and professional loss because he sought by suit brought more than two years after the censure to annul the effect of the censure by showing that his conduct was correct—a suit that failed only because the Supreme Court, New York County, was subservient and the Appellate Division, First Judicial Department, compliant to the Association.

Petitioner brought this action in Kings County, which is part of the City of New York. For Mr. Tondel, attorney

for the respondents, and for Mr. Halpin, of counsel here and attorney in the state courts, the Supreme Court, Kings County, is about as convenient as the Supreme Court, New York County, and the Appellate Division, Second Judicial Department, is much more convenient than is the Appellate Division, First Judicial Department.

This Court has repeatedly emphasized the need for the rule of law. But if this Court denies the petition for rehearing when the record shows clearly that if petitioner tries this action in New York County he will lose, regardless of the merits of his action, a loss which will be costly to petitioner financially and professionally, the Court as to this petitioner makes a mockery of the rule of law.

The Court in deciding whether to grant certiorari must also take into consideration the fact that the three national legal-judicial associations are headed by men (all members of the small group that control the Association) against whom petitioner, with supporting evidence, has made charges of moral unfitness, including the perpetration of a fraud upon this Court and defrauding the Treasury of a large amount.

Respectfully submitted,

EDWARD T. ROEHNER
Attorney for Petitioner

Dated: October 28, 1966.

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

EDWARD T. ROEHNER